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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1228

WILTON ROSS THOMPSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Subject Index

	Page
Reasons for granting rehearing and issuing the writ	2
Conclusion	10

Table of Authorities Cited

Cases

	Page
Shepard v. United States, 290 U.S. 96	10

Texts

I Wigmore on Evidence (3d ed. 1940), Section 154	9
VI Wigmore on Evidence, Section 1865, p. 491	9

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Petitioner prays that this Court grant rehearing of its order of May 6, 1968, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case, as prayed for in the petition filed March 7, 1968, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The petition for certiorari failed to present a question, for which there is substantial support in the record, that may be formulated in these words:

> Whether prejudicial error occurred in admitting (over objection), as evidence that petitioner had committed the offense of burglary, testimony that forty-four (44) days after the date of the burglary petitioner purchased an automobile with the sum of $3,000 in cash, in accordance with the seller's request for payment by a cashier's check or cash.

The Court of Appeals held that such testimony (given by the witness Blair) possessed "relevance" for the reason that it demonstrated

> "unusual circumstances which the jury could regard as incriminating—particularly that appellant [petitioner] produced the sum ($3,000) from a brown paper shopping bag; that it consisted entirely of bills under twenty dollars in denomination and included two large bundles of five-dollar bills and 200 one-dollar bills; that appellant told the witness, Blair, a false story as to the source of the bills; and that the alternate explanation offered at trial (that petitioner kept his funds in unbanked cash to conceal them from a private investigator hired by his former wife) seemed at least questionable." (Opinion, Court of Appeals; see Petition for Writ of Certiorari, Appendix A).

Blair's testimony was challenged in the petition for certiorari upon the ground that

> "Proof of the unexplained possession of unusual amounts of money after a theft, standing alone, is not competent evidence to connect the possession with the theft and is therefore inadmissible" (Pet. 2).[1]

The issue thus raised was regarded by the Government as presenting a question

> "Whether evidence that petitioner paid for a car in bills of small denomination some time after the bank burglary was admissible without proof that petitioner was impecunious prior to the offense" (Op.Br. 1-2).

Thus, the question presented by this petition has not heretofore been raised. We think, for the reasons now urged, that it constitutes a substantial ground for the granting of the writ.

1. It was, we submit, the testimony of Blair, offered as an important part of the Government's case in chief, that brought about petitioner's conviction. On a prior trial, upon the same evidence that was adduced here, the jury was deadlocked 7 to 5 after two full days of deliberation, and a mistrial was declared (Colloquy, Hearing on Motions and Plea, Aug. 20, 1965; Tr. 11). Here, the jury convicted after a period of but several hours from the time it retired (including time spent at lunch).

A fundamental difference between the two trials is that in the first one, Blair appeared merely as a rebuttal witness, the last person to be called to the

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[1]Pet. refers to Petition for Certiorari; Op.Br. refers to Brief in Opposition.

stand; his testimony was accorded a minor role, in rebuttal, and was covered by limiting instructions. Here, however, Blair's testimony was used as a cornerstone of the prosecution's case in chief, and the jury was exhorted to accept it as primary proof of petitioner's guilt.

No connection was ever established between Blair's testimony and the offense of which petitioner stands convicted. The "brown paper shopping bag" was not claimed to have been involved in the burglary. None of the money that petitioner paid to Blair was identified as being a portion of the proceeds obtained in the burglary. Nor was it ever shown that the money taken (amounting to more than $19,000; Op.Br. 4) corresponded in a fairly close way to the bills with which petitioner purchased Blair's car. These were described as being in denominations of twenty dollars, ten dollars, five dollars and one dollar bills (Tr. 325). Coincidence might conceivably be claimed if fifty dollar, one hundred dollar, or one thousand dollar bills were present in both instances, but it strains credulity to permit incriminating inferences to be drawn from the fact that petitioner possessed bills of denominations that are the most commonly used in the country.

It is not claimed that petitioner was impecunious prior to the date of the burglary. Neither was it contended that, following that date, he showed a sudden acquisition of wealth. The Government, characterizing petitioner's purchase of the car from Blair as exhibiting a "peculiar manner of payment barely one month

after the bank burglary, using small bills carried in a paper shopping bag", argues that the testimony therefore possessed "sufficient probative value that no foundation of impecuniosity was necessary" (Op. Br. 6). But of what was it probative? Surely not, in and of itself alone, that petitioner was a thief. May a reasonable inference be drawn from such testimony, standing alone, that the money paid for the car was a part of the stolen bills? If such an episode, without more, can be received as evidence, then a conviction may be had on nothing more than a jury's uncontrolled speculation. Plainly, it was precisely to excite suspicion against petitioner that the evidence was proffered. But while suspicion may justify a prosecution, it does not support a conviction.

2. The prejudice was compounded by Blair's testimony of the allegedly false explanation given by petitioner for his possession of cash funds. Suppose the explanation to be untrue; does it follow that petitioner thereby created proof that he had committed a burglary? He was under no obligation to account to Blair for his possession of the money, and whatever explanation he chose to give was irrelevant to the issue of his alleged guilt of the crime charged. It is doubtful that Blair's testimony would even tend to prove that petitioner was in possession of stolen funds, let alone that he had stolen them. To permit the decisive weight to be accorded to Blair's testimony that the prosecutor urged upon the jury, was to base the conviction upon suspicion. Nor did the trial court give any cautionary instruction to guard against the very eventuality that occurred here.

There is nothing so extraordinary about the use of $3,000 in cash as to justify the admission of Blair's testimony. Many people pay cash for purchases, even when buying an automobile. They may do this for reasons as diverse and varied as the human imagination may conceive of, yet no inference of illegitimacy may permissibly attach to such conduct. Nor is this mere conjecture as respects the petitioner. Some three or four months prior to the date of the burglary, petitioner bought an automobile from the witness Coppock, an accountant, paying for it with a trade-in of his own automobile plus $1,543.86 in cash (Tr. 718). Petitioner's salary in 1964 was shown to be in excess of $12,000 (Tr. 641). There was also available to him the earnings of the witness Sheila Coats (now petitioner's wife), which came to $400 per month. Miss Coats testified that she and petitioner regularly cashed in their paychecks, receiving small bills, because petitioner was going through a divorce proceeding and was under surveillance by an investigator employed by his wife (Tr. 642-3). The Government offered no evidence to contradict her testimony.[2]

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[2]The Government did, however, seek to exploit petitioner's divorce proceedings by distorting their significance. In his opening statement to the jury, the prosecutor stated he would prove that the divorce action was creating a financial burden for petitioner; that he was further burdened by the necessity of maintaining three residences: the home in which his wife resided, the apartment occupied by Sheila Coats, and another apartment that petitioner allegedly shared with Mary Alomar. These assertions were presumably made to establish that petitioner possessed a motive for the burglary, and was therefore a logical suspect in "an offense for which pecuniary gain is the motive"

3. If, contrary to our contention here, it was incumbent that the purchase of the automobile with $3,000 in cash should receive an explanation, did not the Government's case itself adequately provide it? For it was not the the testimony of Blair that petitioner suddenly appeared out of the blue, carrying $3,000 in cash to make the purchase. It was Blair himself who testified that, having received $50 as a cash deposit on the day the purchase was made, he requested the balance to be paid either by cashier's check or by cash (Tr. 386-7). On the following day, petitioner appeared with the brown paper shopping bag in which, conforming to the condition imposed by Blair, the money was contained.[3]

(Op.Br. 6). No evidence was ever offered to substantiate these assertions.

The opening statement also promised proof that, shortly after the date of the burglary, petitioner exhibited a large amount of cash to Mary Alomar; and that he bought expensive electronics and sport cars. Such evidence would presumably point to a disposition for reckless display of suddenly-acquired wealth, a trait that the popular mind attributes to criminals. However, the Government concedes that "The evidence did not establish the allegations made in the opening statement regarding petitioner's divorce problems, the hi-fi set, or Mary Alomar" (Op.Br. 8).

[3]The brown paper shopping bag has become a popular symbol for commission of bank robberies. We can only surmise that the prosecutor was counting on an assumption: that the jury had seen as many television programs as he must have seen, in which bank robbers are portrayed industriously stuffing money into a paper shopping bag; and upon a hope: that the jury would make the illogical leap, from petitioner's use of a shopping bag in which to carry cash to the conclusion that the bag served to place him at the scene of the crime in precisely the mold that television has created for public consumption. If, indeed, the prosecutor had any different motive, we cannot imagine what it was, seeing that the shopping bag appeared for the first time forty-four days after the burglary.

4. In defending the admission of Blair's testimony, the Government concedes the rule to be

> "that proof of unexplained possession of unusual amounts of money following an offense for which pecuniary gain is the motive requires a preliminary showing of impecuniosity before the crime as a foundation for admissibility" (Op. Br. 6).

Admittedly, no such showing was made, and all the evidence is to the contrary. We are left, then, with the bare fact of petitioner's possession of money, a fact possessing no probative value whatever.

> "The mere possession of a quantity of *money* is in itself no indication that the possessor was the taker of money charged as taken, because in general all money of the same denomination and material is alike, and the hypothesis that the money found is the same as the money taken is too forced and extraordinary to be receivable." (I Wigmore on Evidence [3d ed. 1940] §154.)

Nor is this a case where either identity of denominations or some other close correspondence is established between stolen money and that which is found on the person or in the possession of the accused at a date not remote from the theft (cf. Wigmore, supra).

5. To assess the gravity of the prejudice done to petitioner, it is necessary to consider what else the Government proved. Other than the testimony of Blair, the case against petitioner rests on Robeson, co-defendant who pleaded guilty to the charge of

committing the July 31st burglary and implicated petitioner; and Heim, who testified that he and petitioner had agreed to commit a bank burglary four weeks earlier, but the plan was abandoned. Robeson's testimony was uncorroborated; he was sentenced to serve eighteen months. Heim, who was the informing source for the FBI in this case, had been convicted earlier that year for placing his wife in a house of prostitution, and was on parole. It is difficult to believe, especially in light of the outcome of the first trial, that petitioner would have been convicted had the testimony of Blair been excluded, as it should have been.

6. Though we think Blair's testimony was neither relevant nor competent and was wholly inadmissible on any theory, it would not follow from a contrary viewpoint that the evidence should have been received —or, once received, retained against the motion that was made to strike. For even evidence that is admissible may be of a nature that requires its rejection. Such is the rule where the probative value is weak and the danger of prejudice great.

> "So also, if certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, * * * there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose." (VI Wigmore on Evidence, §1865, p. 491.)

It is idle to suppose that the objection is met by an instruction to the jury that it may accord only such weight to the testimony as it sees fit. What guide

lines does the court thus provide? None. The only reliable rule is this: When the risk of prejudice is so great as to upset the balance of advantage, the evidence goes out (*Shepard v. United States,* 290 U.S. 96).

CONCLUSION

For the reasons set forth above, and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
May 29, 1968.

Respectfully submitted,

RICHARD GLADSTEIN,
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Richard Gladstein,
Counsel for Petitioner.

Authorization for Attorney to Act As Counsel

I, the undersigned, petitioner in the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari, hereby certify that I have retained and authorize Richard Gladstein, Esq., to act as my counsel of record in the filing of the aforementioned petition and in all future proceedings herein.

Dated, San Francisco, California,
May 29, 1968.

Wilton Ross Thompson,
Petitioner.